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No. 90-1779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

TELESAVER, INC. and VISTA TECHNOLOGIES, INC.,
Petitioners

v.

UNITED STATES TRANSMISSION SYSTEMS, INC.,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners, Telesaver, Inc. ("Telesaver") and Vista Technologies, Inc. ("Vista") submit this Reply Brief in support of their prayer that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit and in response to the Respondent United States Transmission Systems, Inc.'s ("USTS") Brief in Opposition to the Petition for Writ of Certiorari.

I. THIS CASE PRESENTS ISSUES OF CONSTITUTIONAL DIMENSION

Contrary to Respondent's Brief in Opposition, this case presents fundamental issues of constitutional dimension which warrant consideration by this Court. The lower court's denial of the right to a jury without explanation, the attribution of one Plaintiff's waiver to another Plain-

tiff, and the lower courts' total failure to scrutinize the claimed waiver with utmost care, are in gross disregard of existing precedent and directly contravene the Seventh Amendment.

Furthermore, the issue as proposed by the Respondent is factually and legally incorrect. Directly contrary to the suggestion in the issue as framed by USTS, there has never been any finding that Telesaver and Vista were a single entity or were to be treated as a single entity for any purpose, as can be seen in Appendix C to the Petition. The trial court based its decision to deny the request for a jury trial solely on the fact that the Amended Complaint added no new facts that were not presented in the original pleading.[1] The trial court did not make any finding that Telesaver and Vista, being related entities, should be treated as a single person for purposes of the jury trial demand. The Fourth Circuit, in its review of the lower court's action, did not provide any basis whatsoever for its affirmance of the denial of the jury trial demand. Indeed, the Fourth Circuit did not even specifically address the jury trial issue, merely reciting that the "appeal is without merit." *See* Appendix A to Petition.

II. THIS COURT MUST TREAT VISTA AND TELESAVER AS SEPARATE PERSONS

USTS's recitation of trial testimony of Richard Goldman and other evidence which was not before the trial court at the time the Motion to Strike the jury trial demand was filed, and was not the subject of any factual

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[1] The no new facts standard is meant to apply to an amendment which corrects pleading deficiencies, adds a new cause of action arising out of the same facts or changes the damages sought and does not apply where a new party is added which timely demands a jury trial. *See, e.g., Bank of India v. Handloom House Ltd.*, 629 F. Supp. 281 (S.D. N.Y. 1986); *Pradier v. Elespuru*, 641 F.2d 808, 810 n.1 (9th Cir. 1981).

determinations by the trial court, is irrelevant.[2] There was never any determination by the trial court that Telesaver and Vista were separate entities for any purpose, and there can be no finding on the appellate level that Vista and Telesaver are the same entity. *Fidelity and Casualty Co. of New York v. Jackson*, 297 F.2d 230, 234-35 (4th Cir. 1961).[3] The lower court's denial of the jury trial demand cannot be sustained on the basis of piercing a corporate veil. Maryland law requires that piercing of a corporate veil may only be done to prevent fraud or enforce a paramount equity. *See Dixon v. The Process Corp.* 38 Md. App. 644, 645-646, 382 A.2d 893, *cert. denied*, 282 Md. 731 (1978).

USTS's argument, which was also raised in the Fourth Circuit, that Maryland corporate law is inapplicable in that the right to a jury trial is a federal right, is baseless. Federal law provides that each party has the right to a jury trial. *See* Federal Rule of Civil Procedure 38. However, in order to determine whether a party is indeed a separate party, one must look to state law. Maryland corporate law which defines a corporation as a separate person is substantive. Respondent's argument

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[2] Even if they were before the trial court, the trial court made no finding concerning this argument.

[3] USTS's argument in its Reply Brief that this case presents no issues of fundamental importance because other litigants will not be affected by the lower court's decisions in that the trial court and appellate decisions denying the jury trial demand were unpublished is ludicrous. It is of utmost importance that the lower courts be directed to apply the standards set forth by the Supreme Court in finding a waiver of a jury trial demand. The right to a jury trial is such a fundamental right protected under the Seventh Amendment that it should be deemed waived only by a knowing and intentional waiver. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019 (1938). It is the failure of the trial court and the Fourth Circuit to deem the cherished right to a jury important enough to even address the issue that makes this case so important that this Court must hear the case and direct the lower courts to consider the issues raised herein.

> trary. *See, e.g., Local 783, Allied Industrial Workers of America, AFL-CIO v. General Electric Co.*, 471 F.2d 751 (6th Cir.), *cert. denied*, 414 U.S. 822 (1973); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965).

This request was sufficient to permit the court to exercise its discretion under Rule 39 to allow the action to proceed as a jury trial. *See Daniel International Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061 (5th Cir. 1990) (Plaintiff filed a demand for jury trial in amended complaint. Defendant filed a motion to strike jury demand a year later, which motion was granted. The Court of Appeals held it was an abuse of discretion under Rule 39(b) of the Fed. R. Civ. P. to deny demand for jury trial and remanded the case for jury trial); *Federal Deposit Insurance Corp. v. Palermo*, 815 F.2d 1329, 1333-34 (10th Cir. 1987) (Defendant by filing pretrial memorandum many months before trial seeking a jury trial to attention of district court made sufficient demand for jury trial to invoke district court's discretion.); *Swofford v. B&W, Inc.*, 336 F.2d 406, 408-09 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 653 (1965) (Untimely demand for jury trial under Rule 38(b) has the effect of a motion for jury trial under Rule 39(b)); 9 C. Wright & A. Miller, *Federal Practice and Procedure* 2334 at 112 (1971).

As this Court emphasized in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which have not previously been specifically urged would be out of harmony with this policy. Orderly rules and procedure do not require sacrifice of the rules of fundamental justice.

The lower court failed to follow the guidance in *Hormel v. Helvering* which should be applied in the instant case. The right to a jury trial "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

In affirming the lower court's decision to deny a jury trial, the Fourth Circuit failed to apply its own enumerated standard in determining whether to grant a jury demand untimely filed. In *Malbon v. Pennsylvania Millers Mutual Insurance Co.*, 636 F.2d 936, 940 n.11 (4th Cir. 1980), the court noted that the trial court must determine (1) whether the issues are more appropriate for determination by a jury or a judge (*i.e.* factual versus legal, legal versus equitable, simple versus complex); (2) whether granting a jury trial would cause the opposing party prejudice; (3) the timing of the demand (early or late in the proceedings); (4) any effect a jury trial would have on the court's docket and the orderly administration of justice. These factors, if they had been considered, all weigh in favor of allowing this case to proceed as a jury trial.

However, even the Fourth Circuit's criteria set forth in *Malbon* to measure whether a jury trial should be allowed in the face of an untimely demand is contrary to other circuits which have applied a much more stringent standard of only denying an untimely jury trial demand for strong and compelling reasons, must indulge every presumption against waiver, and have held that the review of a denial of a jury trial demand must be subject to exacting scrutiny. *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728, 731 (10th Cir.), *cert. denied*, 389 U.S. 857 (1967); *Swofford v. B&W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964) *cert. denied*, 379 U.S. 962 (1965); *Local 783, Allied Industrial Workers of America, AFL-CIO v. General Electric Co.*, 471 F.2d 751 (6th Cir.),

cert. denied, 414 U.S. 822 (1973); *Pradier v. Elepuru*, 641 F.2d 808, 811 (9th Cir. 1981); *Heyman v. Kline*, 456 F.2d 123, 129 (2nd Cir. 1972); *cert. denied*, 409 U.S. 847 (1972). Thus, this Court should settle the split in circuits and set the standard to be applied in denying a jury trial demand and should at the very least, remand this case to the District Court for a determination under the "strong and compelling" standard to determine whether the jury trial demand should have been denied.

There can be no doubt that the curtailment to the right to a jury trial in this action was not scrutinized with the utmost care. Indeed, neither the lower court nor the appellate court provided any specific reason for the denial of Vista's timely jury trial demand other than the totally irrelevant recitation by the district court that no new facts were presented by the amended counterclaim. Even though an Order reversing the denial of a jury trial would require a new trial, it should still be granted in light of the fundamental importance of the right to a jury trial. As the court in *Daniel International Corp. v. Fischbach & Moore, Inc.*, 916 F.2d at 1066, explained "[N]otwithstanding the tremendous efforts, time and expense incorporated in the prior bench trial, the district court's order striking this action from its jury calendar was an abuse of discretion".

CONCLUSION

The right to a jury trial is so fundamental that the curtailment of that right by the lower courts so cavalierly and without any scrutiny, let alone strong and compelling scrutiny, clearly constitutes a constitutional error which must be corrected by this Court. This Court must lay down specific rules which will prevent lower courts from ignoring the fundamental constitutional right of a jury trial.

Respectfully submitted,

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